

# LOSS OF MENTAL CAPACITY: A GLOBAL PERSPECTIVE



NOVEMBER 2023

Sponsored by



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# ABOUT STEP

**STEP is a global professional body, with more than 21,000 members comprising lawyers, accountants, trustees and other practitioners that help families plan for their futures.**

Our mission is to inspire confidence in families planning their assets across generations by setting and upholding high professional standards, informing public policy, promoting education, and connecting practitioners globally to share knowledge and best practice.

Full STEP members, known as TEPs, are internationally recognised as experts in their field, with proven qualifications and experience.

As experts in inheritance and succession planning, STEP members draft wills and trusts, and advise on issues concerning international families, protection of the vulnerable, family businesses and philanthropic giving. With global ageing populations, and dementia cases predicted to triple by 2050, mental incapacity is an important and relevant topic on which STEP, with its multi-disciplinary membership, has a unique perspective. Issues concerning capacity are increasingly important and relevant in all aspects of work relating to inheritance and succession planning.

Our aim is to keep our members up to date with developments and help to find solutions to challenges in this area to shape future practice. Along with intergovernmental organisations like the Hague Conference on Private International Law, we are focused on creating a coherent mechanism to enable the cross-border protection of adults and their property when they are not in a position to protect their own interests. We aim to influence government thinking on the commonality of approach to representative powers and cross-border incapacity, alongside improving planning awareness for mental incapacity and expertise among practitioners globally.

# ABOUT ALZHEIMER'S SOCIETY

**Dementia is the UK's biggest killer, and one in three people born in the UK today will develop the disease in their lifetime. Alzheimer's Society is the only UK charity to give vital support to people facing the most frightening times of their lives, while also funding groundbreaking research and campaigning to make dementia the priority it should be.**

Alzheimer's Society is made up of people with dementia, carers, trusted experts, campaigners, researchers and clinicians. Together, they have unparalleled knowledge and experience of addressing the biggest challenges facing people living with dementia.

Gifts in wills from members of the public are a significant source of income for Alzheimer's Society. These gifts fund a third of the services it provides and research it supports. By making it clear how important it is for people to have a valid will in place and encouraging more people to consider leaving a gift in their will, Alzheimer's Society can continue to deliver new research into life-changing treatments and one day, a cure.

As the UK's leading dementia charity, Alzheimer's Society is uniquely placed to make change happen. But it's only through initiatives like the STEP partnership that Alzheimer's Society can continue to give help and hope to people living with dementia today and in the future. Together, we can ensure that dementia no longer devastates lives.

[alzheimers.org.uk](https://www.alzheimers.org.uk)

# ACKNOWLEDGEMENTS

Expert input from STEP members is crucial to the production of STEP research reports. *Loss of Mental Capacity: A Global Perspective* was lead-written by Kathleen Cunningham TEP, with input from Darren Catton TEP, Yue-En Chong TEP, Martin Haanen TEP and Leah Sewell TEP. All are steering committee members of STEP's Mental Capacity Special Interest Group at the date of publication. We thank them for their dedication and commitment. Thank you also to the aforementioned members plus Sheree Green TEP, Claire Van Overdijk KC TEP, Richard Frimston TEP and Jo Summers TEP for their input into the survey questions, and to all 756 respondents for providing their valuable insight and experiences.



# 01.

## EXECUTIVE SUMMARY

### INTRODUCTION

With globally ageing populations,<sup>1</sup> and a recent report stating that dementia cases are set to triple by 2050,<sup>2</sup> issues concerning capacity are increasingly important and relevant in all aspects of work relating to inheritance and succession planning. When a person loses capacity over time, as is often the case with dementia, or has lost capacity at any stage of their life due to disease, a traumatic injury to the brain, or a mental health issue, they are also at increased risk of becoming vulnerable to abuse.<sup>3</sup>

With its multi-disciplinary membership, **STEP and its members have an opportunity to play an active role in assisting clients to plan for and take advanced decisions**, should they lose capacity in the future. Practitioners are also well positioned to assist clients to put plans in place to provide safeguards should future incapacity lead to vulnerable situations, including abuse or neglect.

For practitioners to best be able to assist clients, they need to be supported with appropriate knowledge and legal tools. But how does knowledge, practice and legislation vary across the globe? Do representative powers exist?<sup>4</sup> Are they adequate? Is there commonality of approach? Is there sufficient planning awareness and expertise among practitioners? Are issues of capacity and abuse on the rise?

STEP, supported by the Alzheimer's Society, wanted to determine the impact of the increasing numbers of capacity-related issues experienced by members and their clients. What is the impact on day-to-day practice? What issues arise? What support do practitioners require? What issues do clients experience? How can legislators and policy makers assist by improving legislative and regulatory frameworks? What information does the public need?

To address these questions, we conducted a research survey. The survey was sent to STEP members globally in June/July 2023 and received 756 responses from respondents in 44 countries.



*‘For practitioners to best be able to assist clients, they need to be supported with appropriate knowledge and legal tools.’*

## KEY FINDINGS

The survey responses provided a wealth of insight, which is set out in the following pages and can be broken down into five key findings:

- 1 Capacity issues and requests for advice on the issues have been increasing and will continue to increase. The ageing population demographic is the primary reason for this increase.
- 2 Financial abuse is increasing. It is most prevalent when there is uncertainty about whether a person lacks the mental capacity to make a decision or when a representative is exercising their authority on behalf of the incapable person.
- 3 Capacity is a complex issue for practitioners, service providers and families.
- 4 Although the lasting/enduring power of attorney (LPA/EPA) is an important legal tool for planning for future incapacity, there are barriers and issues to be addressed locally through policy and legislation.
- 5 There is a demand for cross-border recognition and portability of LPA/EPA powers.

1 See WHO Fact Sheet on the *Mental Health of Older Adults* at <https://www.who.int/news-room/fact-sheets/detail/mental-health-of-older-adults>.

2 See pp2-3 of the WHO report: *Global action plan on the public health response to dementia (2017-2025)*: <https://iris.who.int/bitstream/handle/10665/259615/9789241513487-eng.pdf?sequence=1>

3 Internationally, the term ‘mistreatment’ is increasingly being used and encompasses both abuse and neglect. This survey paid particular attention to financial abuse, but abuse (and neglect) takes many forms. See WHO definition of older adult abuse in: *WHO Fact Sheet on Abuse of Older People*: <https://www.who.int/news-room/fact-sheets/detail/abuse-of-older-people>.

It is important to also note that these experiences apply equally to those in vulnerable situations due to factors other than age. Also worth noting is that incidents of abuse or neglect may start out small and become more serious over time and more than one type of abuse may occur at the same time.

4 See definition of ‘powers of representation’ on page 10.



## THE WAY FORWARD

The survey has **identified a number of opportunities** to guide the way forward in addressing the issues and challenges. These can be grouped into three main priorities:

- 1 Ensure global legislation is robust and consistent**

Legislation and underlying policy vary across the world. Some jurisdictions have implemented robust legislation and regulation. Some have no legislation. Others are not satisfied with the systems they have. We are calling on all jurisdictions globally to implement robust legal frameworks for safeguarding the financial affairs of incapable clients through powers of representation. In line with such initiatives as the *Hague Convention on the International Protection of Adults*, we believe such frameworks should be consistent to encourage cross-border recognition. We will support in this by providing a standard template for such legislation: the **STEP Global Representative Power**.
- 2 Safeguard against abuse**

Protecting vulnerable individuals against financial abuse is a clear priority. We will work to raise awareness about the risks among all stakeholders to ensure these are fully understood and addressed in legislation and practice globally.
- 3 Educate about capacity and associated planning**

It is clear that more needs to be done to educate all stakeholders on issues related to mental capacity and associated planning. STEP can play a vital role in this, from raising public and policymaker awareness about the issues and the need for planning, to working with financial institutions and utility companies to identify and resolve their challenges, as well as supporting practitioners and allied professionals to provide education and guidance to build their knowledge in this area.

The above will require collaboration with legal associations, governmental and non-governmental organisations, charities, financial institutions and health care professionals to **formulate better and more universally accepted and applicable policy**.





# 02.

## ABOUT THIS SURVEY

### OBJECTIVES

#### In this survey, STEP sought to:

-  establish the impact of increasing incapacity issues on the estate and trust industry and the day-to-day practice of practitioners; and
-  gather insight and understanding of the issues for those planning for, or in a position of, loss of mental capacity.

#### The questions fell under five broad categories.

##### 1. Day-to-day experience:

- What are practitioners experiencing in their day-to-day practice in relation to capacity issues?

##### 2. Financial abuse:

- Are practitioners observing incidents of financial abuse? Is it increasing?
- When is financial abuse most likely to occur?
- Do jurisdictions have sufficient safeguards to protect clients from financial abuse?

##### 3. Assessing client capacity:

- Are practitioners confident in their knowledge and ability to recognise the warning signs of potential loss of capacity?
- Do practitioners feel confident enough to make an assessment as to whether someone lacks the capacity to make decisions?
- What are practitioner experiences with virtual assessments?

##### 4. Powers of representation:

- Do jurisdictions have legislation that provides for giving another person powers of representation over a client's affairs?
- What benefits, challenges and issues are experienced in jurisdictions with, and without, this legislation?

##### 5. Cross-border recognition of powers of representation:

- What are practitioners' experiences when seeking to have powers of representation recognised abroad or in another jurisdiction?
- Is cross-border recognition and portability of powers important?

## KEY TERMS

**The following terms were used in the survey and are used in this report.**

### **Capacity/incapacity/incapacitated, capability/capable/incapable, decision-making capacity:**

The terms 'capacity' and 'capability', and related terms, are generally interchangeable. The choice of language reflects the words in legislation and terminology used by healthcare professionals and academics. This report uses the terms interchangeably. It also uses the phrase 'decision-making capacity'.

### **LPA/EPA:**

The short form for lasting power of attorney (LPA) and enduring power of attorney (EPA), two of the most common names for powers of representation. Other terms for powers of representation include 'durable power of attorney', 'continuing power of attorney', and 'private/personal mandate'.

### **Powers of representation:**

A general term to capture documents that confer legal authority onto a selected representative(s) to make decisions for a person without the necessary mental capacity for that specific decision(s).

### **Representative:**

The general term used for a person appointed under a power of representation.

### **Virtual assessments:**

Any capacity assessment conducted online or remotely through technological mediums such as a laptop/mobile device/computer. Virtual implies the assessment has not been conducted in person and instead via web-based video conferencing applications such as Zoom, MS Teams, Google Meet, etc.

**NOTE:** *The survey and this report focuses on powers of representation for finance and property matters. 'Property' in this regard refers to assets. This report does not address matters related to powers of representation for health and welfare matters.*

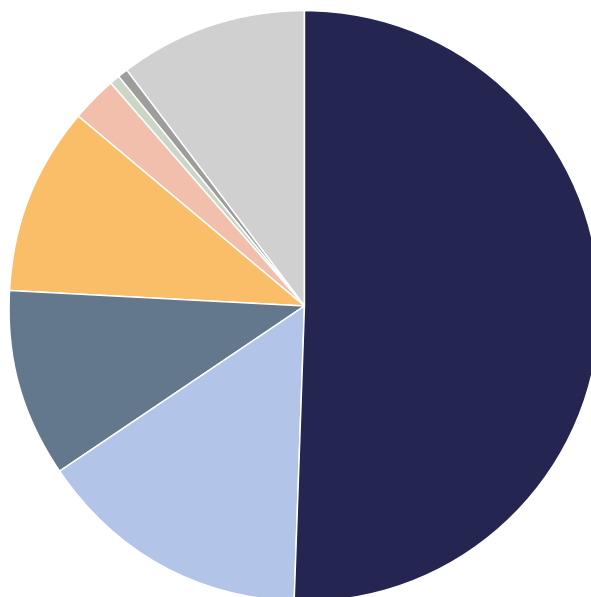


## RESPONDENTS

Our survey ran from 20 June to 9 July 2023. **We received 756 responses from respondents in 44 countries.** Respondents represented all STEP regions and the full spectrum of STEP practitioners across the estate and wealth planning sectors. Importantly, the results reported in this survey reflect shared experiences across jurisdictions and professions.

### Q1: What is your profession? (n=756)

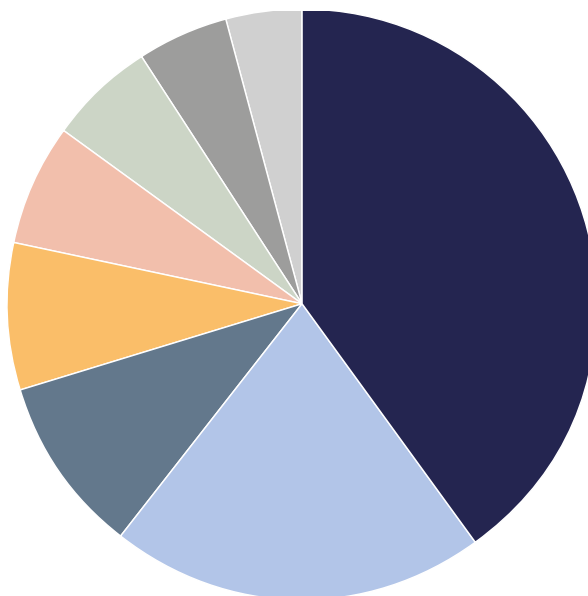
ANSWER	%	RESPONDENTS
Lawyer/Solicitor/Attorney/Barrister	51%	383
Trustee	15%	113
Tax Advisor/Accountant	10%	79
Wealth Manager/Investment Advisor/Financial Advisor/Banker	10%	78
Will writer	2%	18
Non legal/financial profession (e.g. social worker, medical professional, capacity assessor)	1%	5
Notary	1%	4
Other	10%	76



**Q2: In what country are you based?** (n =756)

*NB: Answers have been grouped into regions*

ANSWER	%	RESPONDENTS
UK and Ireland	39%	292
Canada	20%	151
Asia	9%	71
Continental Europe	8%	58
Australasia	6%	48
Caribbean and Latin America	6%	44
Crown Dependencies	5%	35
US	4%	30



## 03.

# SURVEY FINDINGS

1

### FINDING 1:

**Capacity issues and requests for advice on the issues have been increasing and will continue to increase. The ageing population demographic is the primary reason for this increase.**

Although not all older adults will experience capacity issues or become vulnerable to abuse, as one ages, the risks of finding oneself in a vulnerable situation increases whether due to a decline in decision-making capacity or other circumstances.

In 2017, the World Health Organisation (WHO) noted that ‘The world’s population is ageing rapidly. Between 2015 and 2050, the proportion of the world’s older adults is estimated to almost double from about 12% to 22%. In absolute terms, this is an expected increase from 900 million to 2 billion people over the age of 60. Older people face special physical and mental health challenges which need to be recognised.’<sup>5</sup>



In its 2017 report, *Global action plan on the public health response to dementia (2017-2025)*, the WHO noted that ‘worldwide, around 50 million people have dementia, and there are nearly 10 million new cases every year.’ The report also notes the implications for the person, carers, family and society at large.<sup>6</sup>

The impact of these facts, along with the increasing attention to both mental health issues and the rights of all adults to be supported to make their own decisions,<sup>7</sup> is experienced across practitioners’ practices.

<sup>5</sup> <https://www.who.int/news-room/fact-sheets/detail/mental-health-of-older-adults>

<sup>6</sup> See pp2-3 of the WHO report: *Global action plan on the public health response to dementia (2017-2025)*: <https://iris.who.int/bitstream/handle/10665/259615/9789241513487-eng.pdf?sequence=1>

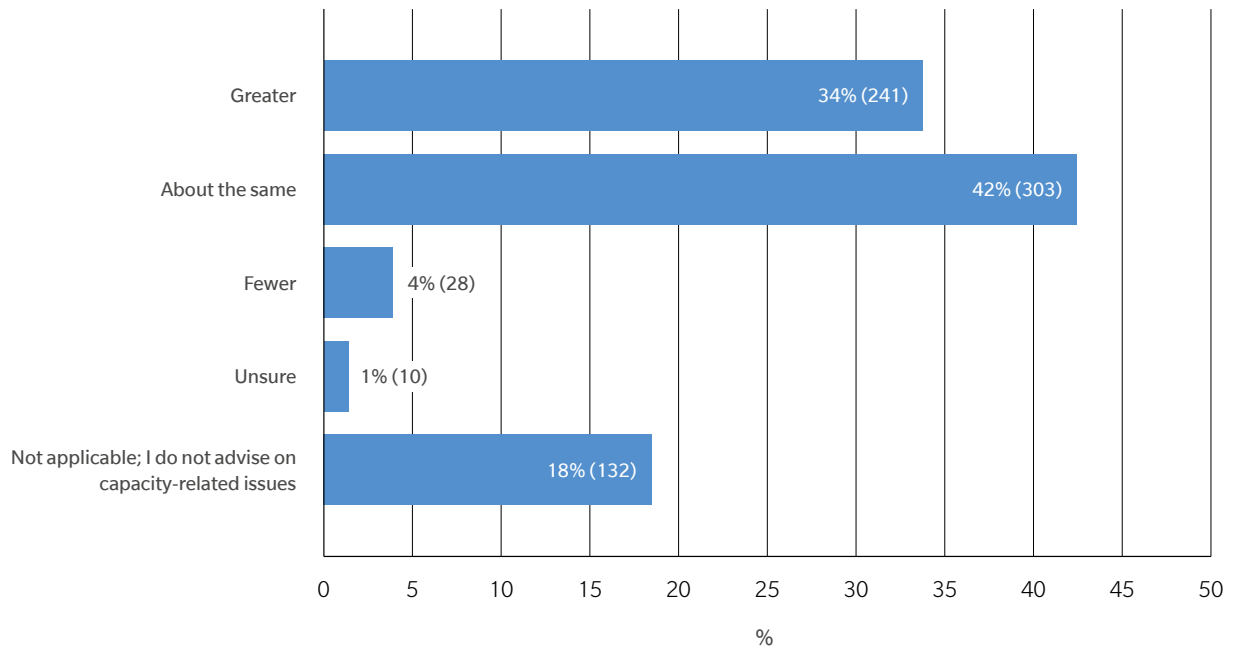
<sup>7</sup> Many countries are committed to implementing the United Nations Convention on the Rights of Persons with Disabilities (<https://social.desa.un.org/issues/disability/crpd/convention-on-the-rights-of-persons-with-disabilities-crpd>). See Article 12 – *Equal Recognition Before the Law*.

**82% of respondents expect the demand for capacity-related advice to continue to increase**

Although 34% of respondents report that they have already observed an increase in the demand for capacity-related advice, and 40% reported it was about the same, **the overwhelming majority (82%) expect the demand to increase over the next five years.**

The most common reason cited by respondents for this increase was the ageing population and related issues. In addition to population demographics, respondents noted the increase in life expectancy and the increased awareness of mental capacity issues. Many noted that their own client base is ageing. Others noted the increase in addiction and mental health issues at younger ages.

**Q7: In the last 12 months, have you been advising more or fewer clients around capacity-related issues? (Select one) (n= 714)**

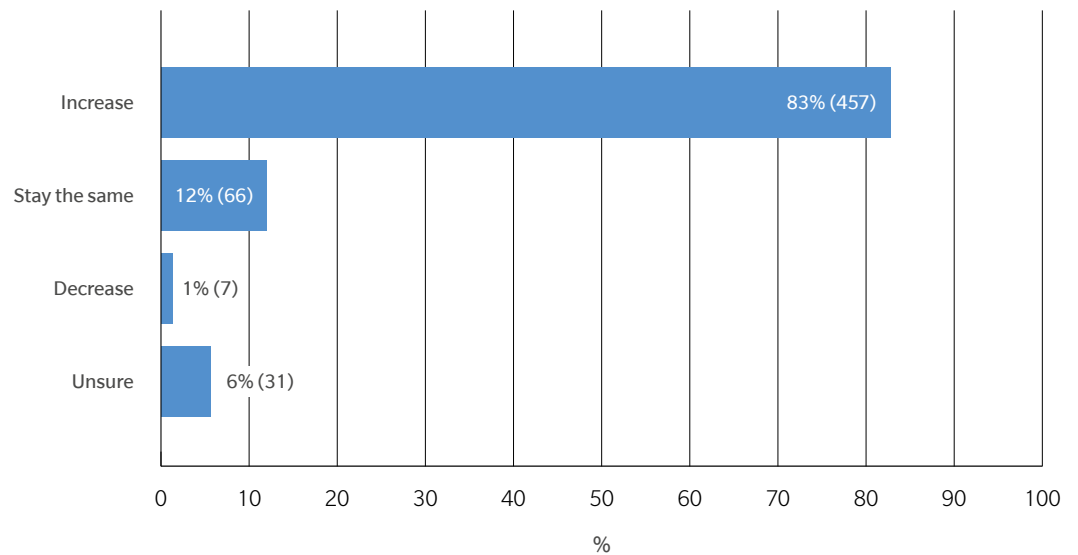


*'People are becoming more aware that plans can be put into place.'*

*'People are living longer, and thus more cases are arising, but also people's affairs are often more complex.'*

**Q8: Do you expect this to increase or decrease in the next five years?**

(Select one) (n= 552)



### Respondents often use their discretion on when to require a capacity assessment before taking instructions

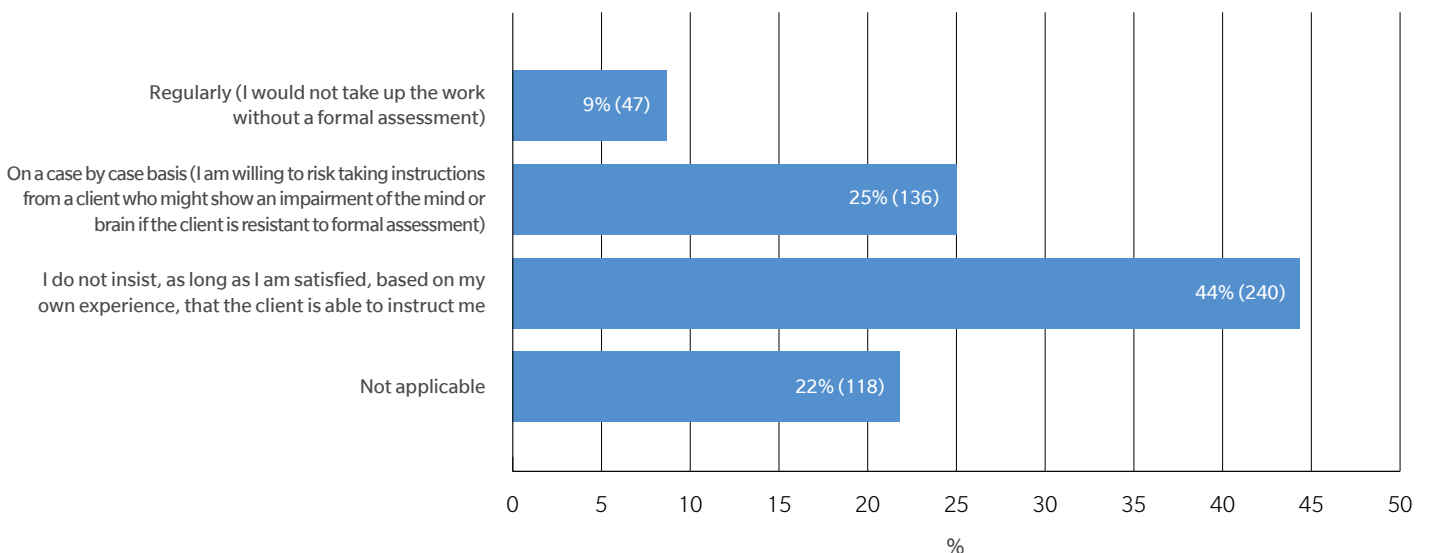
Practitioners must be satisfied that a client can provide instructions. At some point, questions may arise as to whether a client has the capacity to make a specific decision or provide instructions. In some instances, it may be necessary to consider whether a formal capacity assessment is required. Lawyers and notaries are trained in the legal tests of capacity for different types of decisions. These tests are established in legislation and case law. When there is doubt as to whether the legal test has been met, a professional with the appropriate knowledge, skills and qualifications may be required to carry out a formal assessment. In practice, informal assessments occur all the time, depending on the facts and circumstances.

STEP wanted to know how frequently practitioners insist on a formal capacity assessment.

**44% only require an assessment if they are not satisfied**, based on their own experience, that the client lacks capacity to provide instructions. And **25% reported that they decide on a case-by-case basis**. Depending on the circumstances, they may risk taking instructions. Only 9% indicated that they ask for mental capacity assessments regularly before taking up work.

As practitioners encounter more and more clients where capacity may be in question, it will be important to ensure that all practitioners have access to appropriate information and education on capacity and how it is assessed.

#### Q20: How frequently do you insist that your client undergoes a mental capacity assessment? (Select one) (n=541)





### There are significant concerns about virtual capacity assessments

COVID-19 accelerated interest and demands for being able to carry out capacity assessments remotely. STEP wanted to learn more about member experiences and their views about the benefits and challenges of virtual assessments.

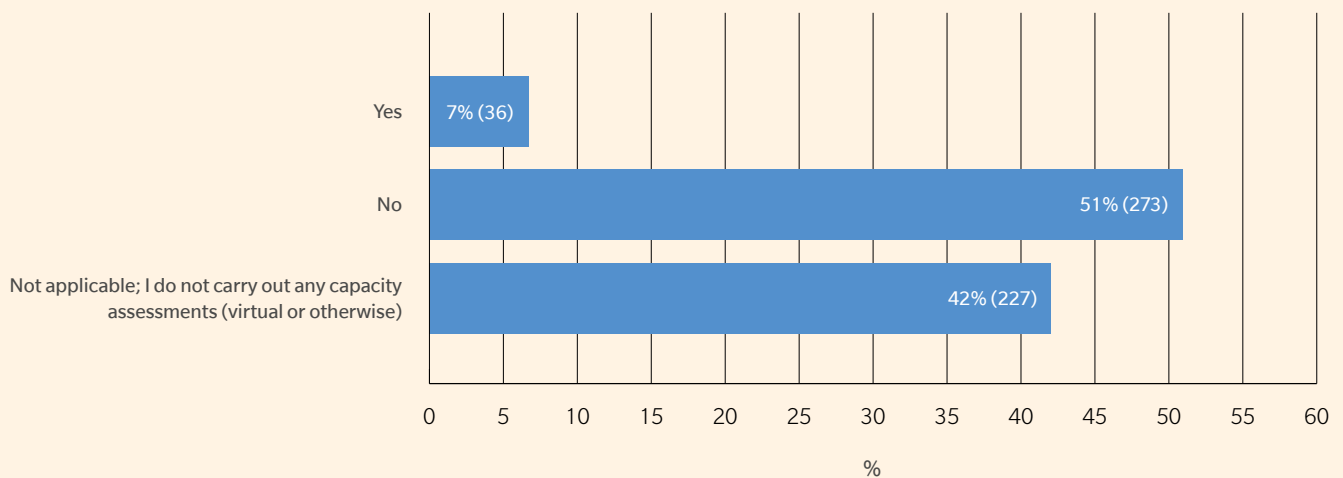
Although **only 7% of respondents reported that they carry out virtual capacity assessments** and some positive experiences were reported, many challenges were identified. These included lack of laws/regulations or guidance and concern about assessments being challenged at a later date. Concerns were expressed about undue influence and difficulty assessing behaviour and body language. There was also general consensus among these respondents and those who do not conduct virtual assessments that virtual assessments are not as robust.

It is, however, worth noting the positive benefits reported, which included clients being more comfortable in their own surroundings, convenience and practicality, efficiencies and costs savings and the potential to widen the availability of assessors. The ability to observe body language such as voice and nuanced movements of face and eyes was also included as a benefit.

Some respondents distinguished circumstances when virtual assessments were beneficial and when they would not use them. For example, older clients where capacity is a concern.

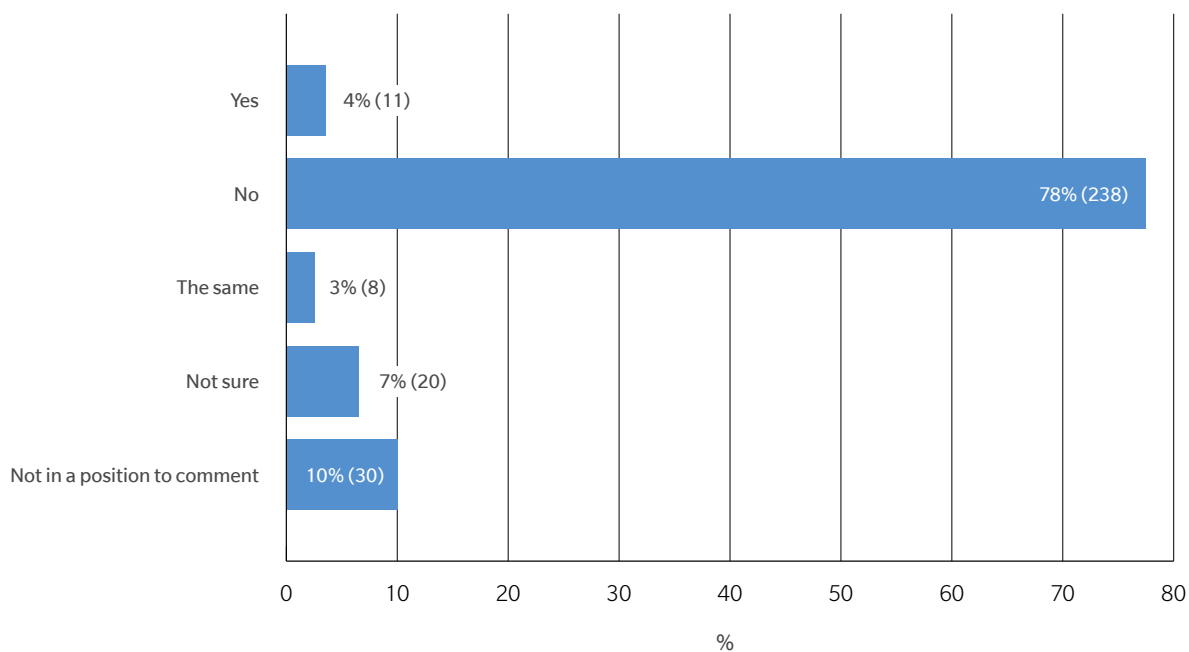
#### Q22: Do you carry out virtual capacity assessments for preparation of LPAs/EPAs?

(n=536)



**Q27: Do you feel virtual assessments are as robust as in-person assessments?**

(n=307)



*'You never know who is in the background that could be prompting or coercing the client.'*

*'It is very hard to get a sense of someone's capacity without meeting them in person and establishing a baseline between meetings.'*

**More clients over the age of 55 are making LPAs/EPAs, younger populations are not.**

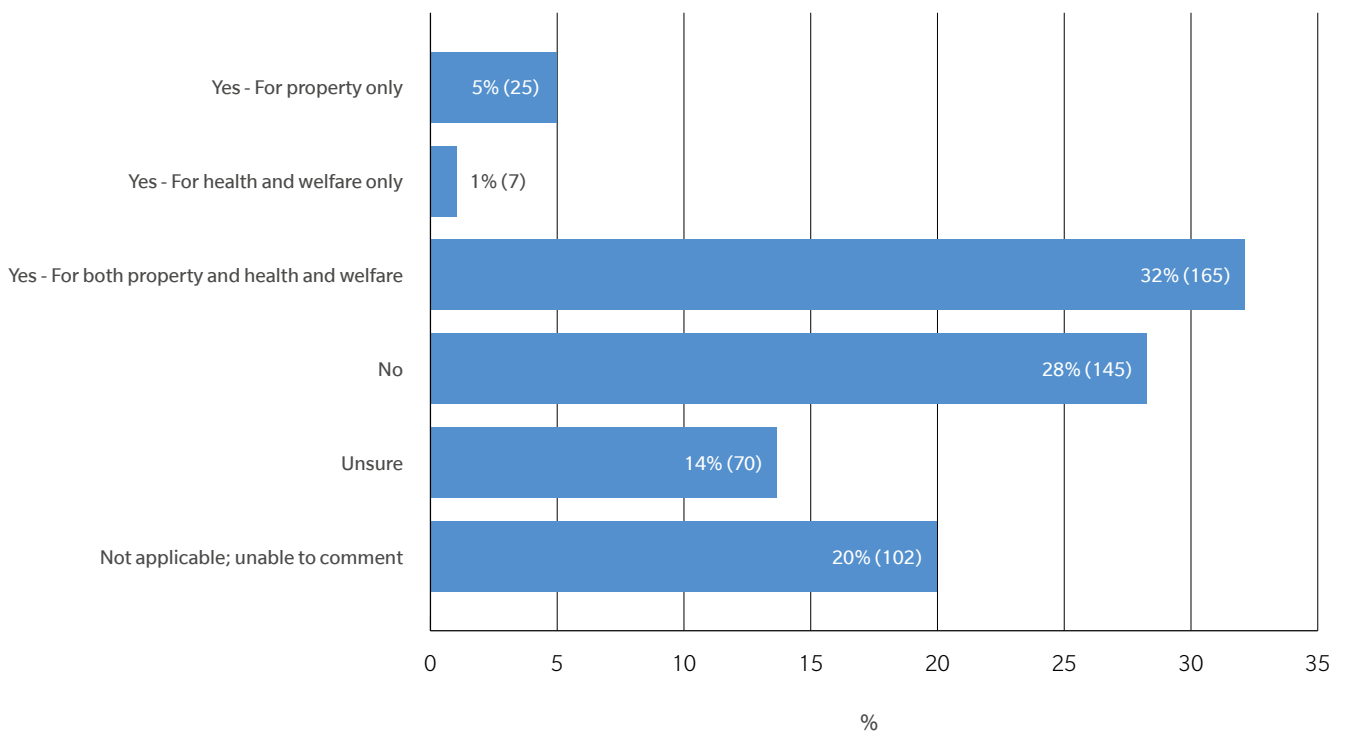
The survey revealed that planning and preparation of LPAs/EPAs has **increased over the past 12 months**. Respondents attributed the increase to two factors in particular:

- Greater awareness of the issues (38%)
- Having experienced situations of loss of capacity and/or related issues (23%)

Respondents reported that the increase in planning is greatest with clients over the age of 55; they did not report increases in younger generations.

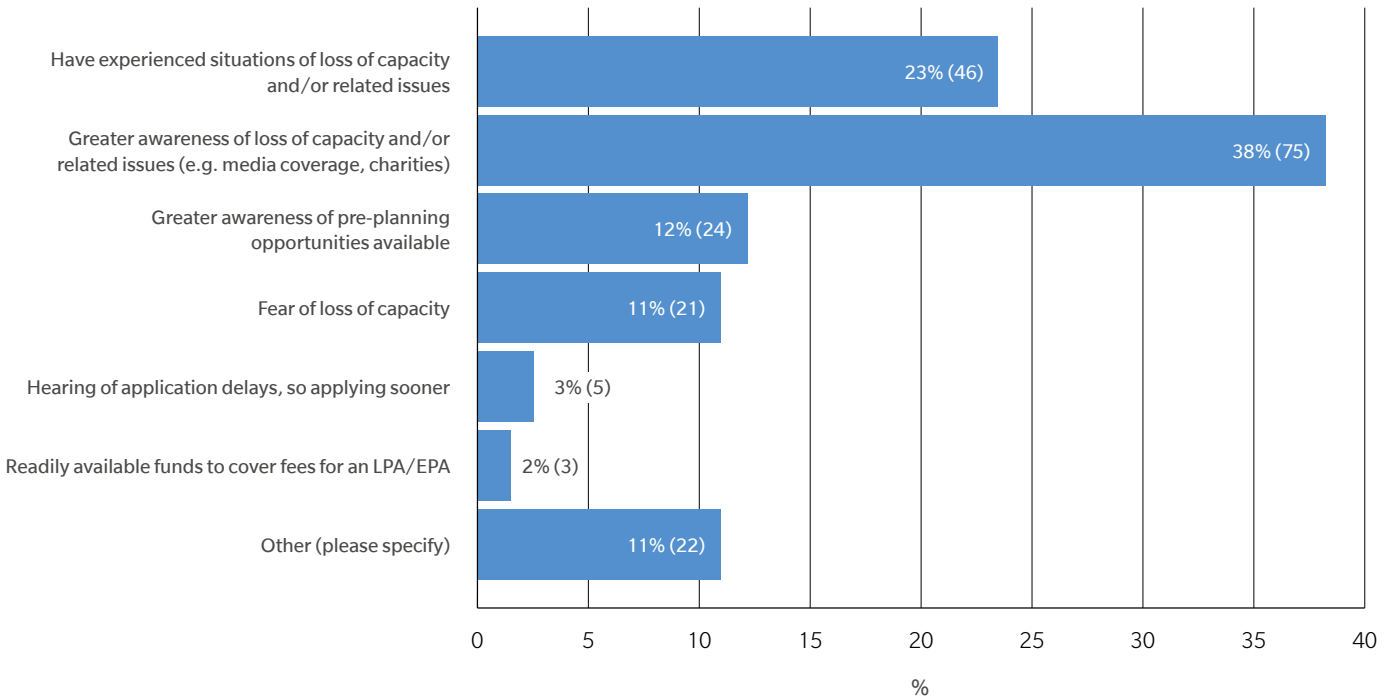
**Q34: Have you observed an increase in LPAs/EPAs being created in the last 12 months?**

(Select one) (n= 514)

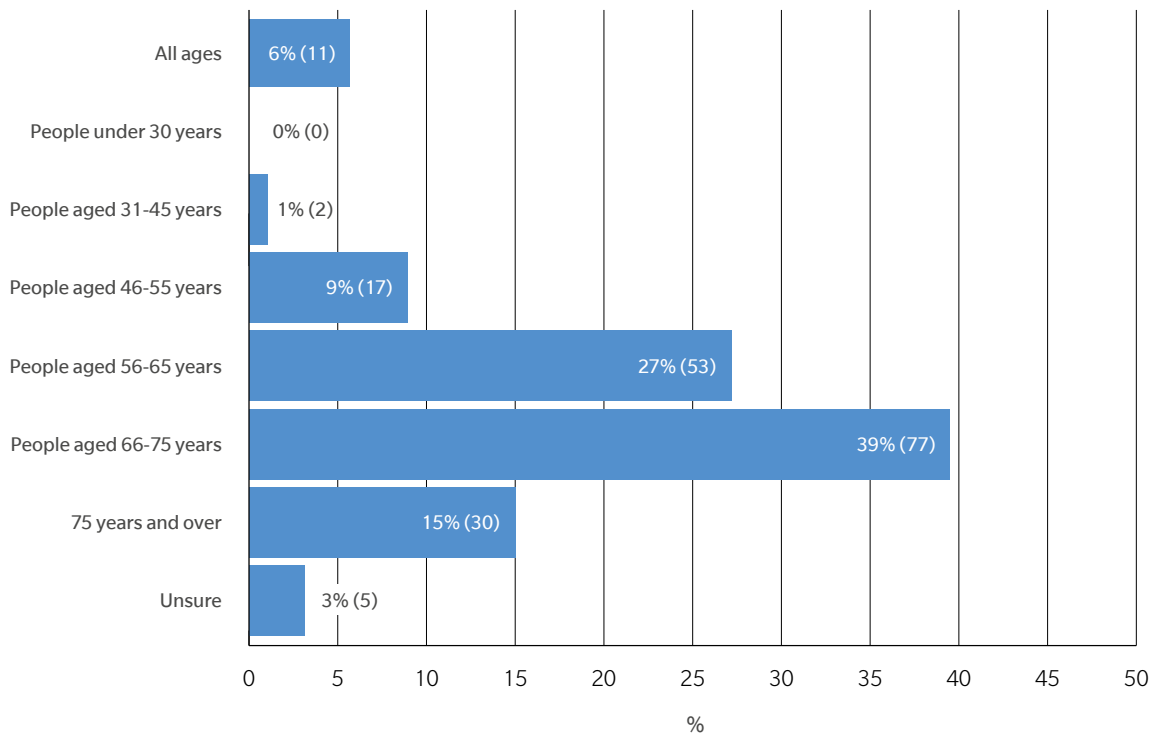


*‘The global pandemic has resulted in more clients being aware of their own mortality and capacity, having seen what others have gone through’*

**Q35: Since you have observed an increase, which of the following would you attribute as the main reasons? (Select one) (n= 196)**



**Q36: If you have seen an increase [in making LPAs/EPAs], in which group has it been the greatest? (Select one) (n= 195)**



## 2

**FINDING 2:**

**Financial abuse is increasing. It is most prevalent when there is uncertainty about whether a person lacks mental capacity to make a decision or when a representative is exercising their authority on behalf of the incapable person.**

Financial abuse of clients in vulnerable situations is inextricably linked to a client's decision-making abilities. Although the risk of dementia increases as one ages, there are many other reasons for clients to be incapable of making some, or all, of their own decisions.

Whether the reasons for compromised decision-making abilities are attributed to the onset of dementia, a sudden trauma that affects the brain (e.g. a stroke or a brain injury arising from an accident), mental health conditions (whether temporary or permanent), or another disease, detecting a decline in a client's decision-making capacity can be challenging. Importantly, it is also a time when financial abuse may occur, whether or not the perpetrator's actions are intentional.

STEP wanted to gather information about practitioner experiences with, and confidence in recognising, financial abuse.

*'It is also a time when financial abuse may occur, whether or not the perpetrator's actions are intentional.'*



### Financial abuse is increasing

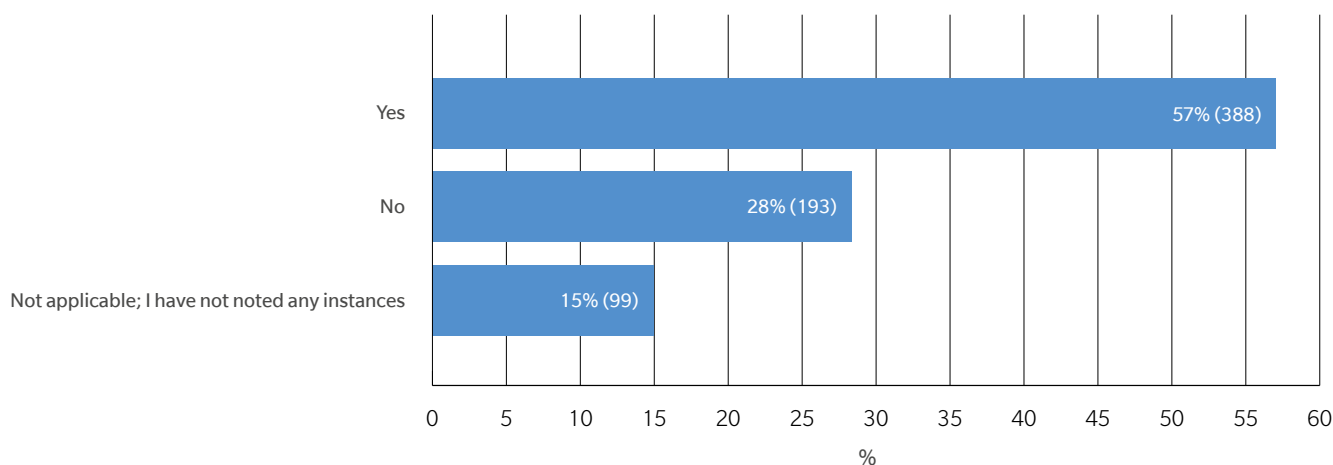
The majority of respondents noted that **they have observed instances of financial abuse or suspected abuse (57%)**. When asked if respondents had observed an increase in the last two years, 39% report an increase and 43% report no increase. These findings are concerning. Although statistics on abuse (and neglect) are difficult to confirm, research suggests that abuse (of varying types) **may affect over 15% of older adults**.<sup>8</sup>

With incidents of abuse increasing, it is important that practitioners have information on how to recognise when abuse may be happening and how to respond. Although many respondents reported that they are confident that they can recognise signs of financial abuse of a vulnerable person, the survey revealed that many were not and more information would be helpful. Notably those reporting that they were confident in recognising signs of financial abuse reported that they had received training in this area.

Learning needs mentioned by respondents included:

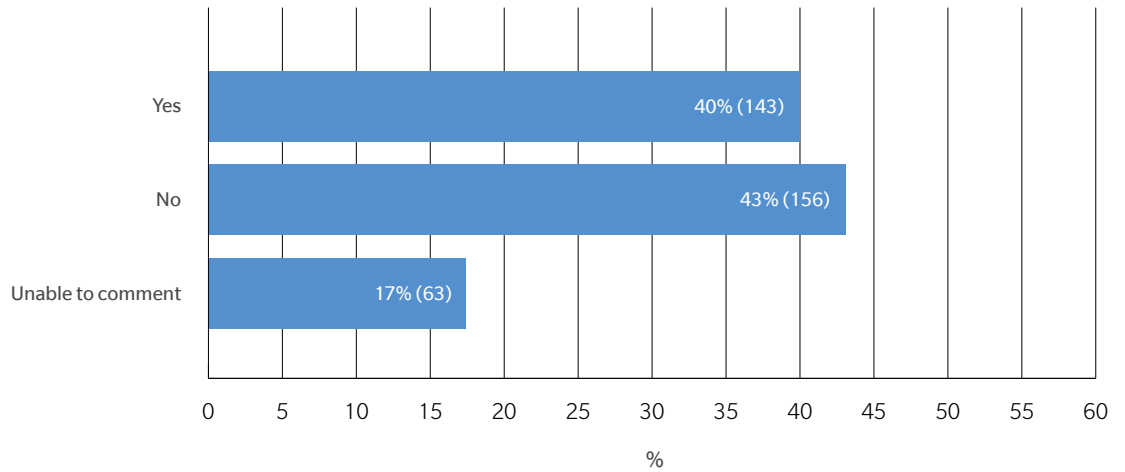
- steps to take to prevent abuse of the LPA/EPA by the representative;
- steps and processes to take when abuse is suspected or observed;
- awareness of ‘hustles’ and how to spot them;
- steps to take where one has concerns about family manipulation but the client does not want anyone to get involved; and
- understanding the difference between ‘lack of capacity’ and ‘undue influence’.

#### Q9: Have you ever noted any instances of vulnerable person financial abuse or suspected financial abuse, such as LPA/EPA coercion? (Select one) (n=680)

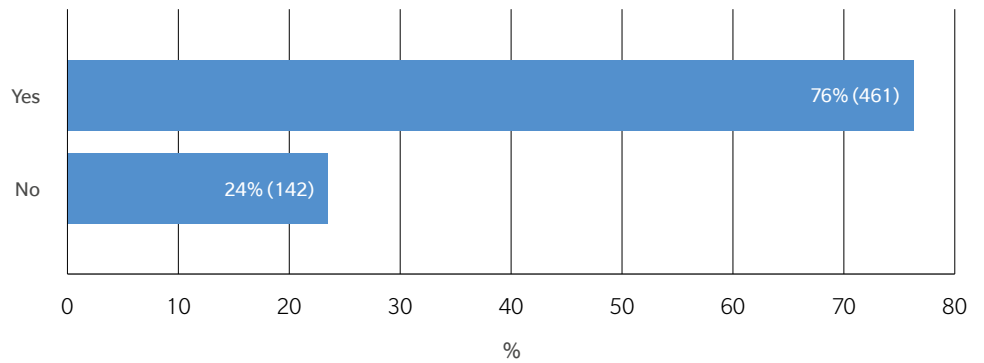


<sup>8</sup> See the WHO Fact Sheet on Abuse of Older People at <https://www.who.int/news-room/fact-sheets/detail/abuse-of-older-people>. Research from different countries in respect of their own populations note the many challenges that arise when trying to collect statistics on the prevalence of different types of abuse.

**Q10: Have you observed an increase in vulnerable person financial abuse, such as LPA/EPA coercion, over the last two years? (Select one) (n=362)**



**Q11: Do you feel confident in recognising the signs of vulnerable person financial abuse? (Select one) (n=603)**



**Financial abuse is most prevalent when there is uncertainty about whether a person lacks mental capacity to make a decision, or when a representative is exercising their authority on behalf of the incapable person.**

Although financial abuse can occur at any time and can be committed by a variety of people in one's life, respondents identified **two critical points in time where financial abuse is most prevalent**. They are (1) when there is uncertainty about whether a person lacks mental capacity to make a decision for themselves (40%), or (2) a representative is exercising their authority on behalf of the incapacitated person (36%).

Although these are important risk factors to be aware of, other risk factors that can alert a practitioner to potential abuse need to be recognised. For example, respondents identified several other situations when abuse may occur. Themes included when:

- the family is involved;
- the representative is acting in their own interests;
- a third party is involved; and
- situations involve banking.

Respondents also pointed to the **emphasis now being placed on supporting someone to make their own decision**.<sup>9</sup> Related to this observation is the fact that many jurisdictions have legislation that sets out an assumption that a client has capacity unless shown otherwise.

The tensions between autonomy and safeguarding are an ongoing challenge.

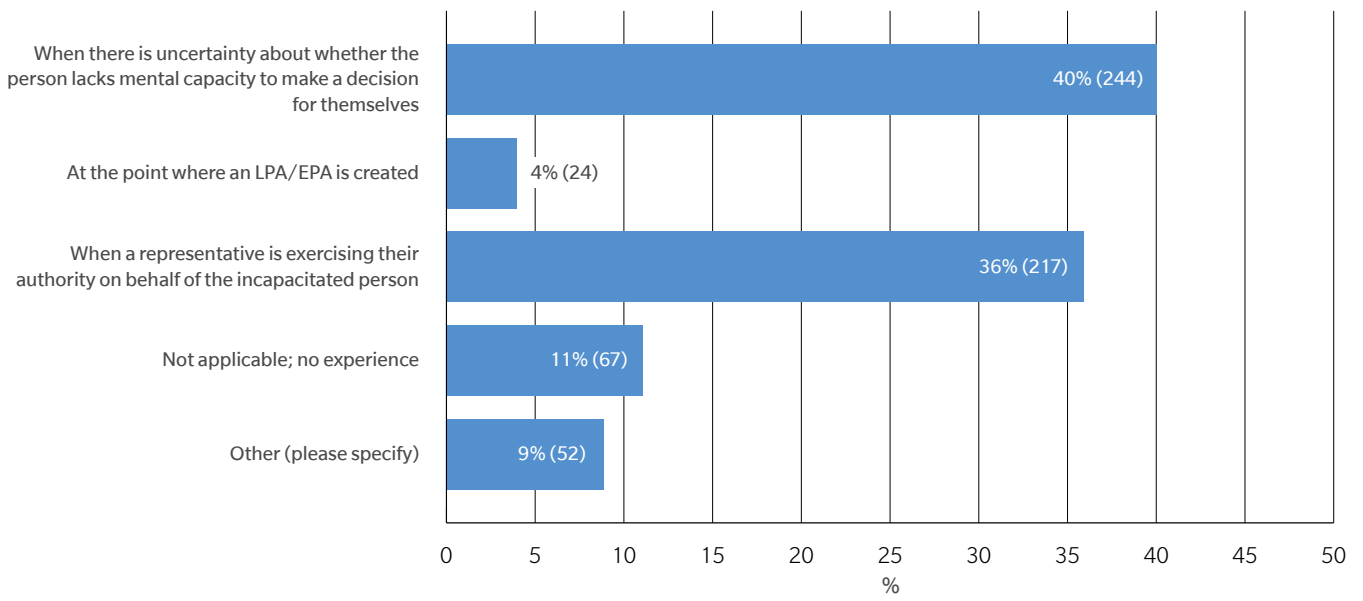
*'It's a good thing that the donor gets to choose their own attorney. However, they don't always make the best choices. Education of the representatives (in respect of their role and authority) is lacking.'*

*'There are inadequate preventive or proactive measures to bring vulnerable persons under protection from exploitation by people wanting to take advantage.'*

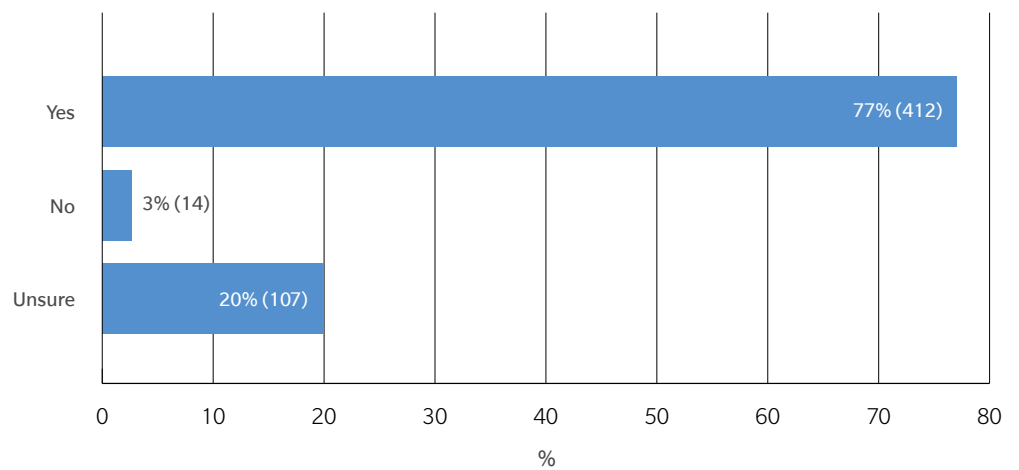
<sup>9</sup> See article 12 of the United Nations Convention on the Rights of Persons with Disability, to which many countries are signatories, including Australia, Canada, Ireland, New Zealand and the UK. <https://social.desa.un.org/issues/disability/crpd/convention-on-the-rights-of-persons-with-disabilities-crpd>



**Q12: When is financial abuse most prevalent?** (Select one) (n=604)



**Q19: Is there an assumption in your jurisdiction of a client having capacity, unless shown otherwise?** (Select one) (n=533)



**Concerns about financial abuse range from inadequate monitoring of representatives to public awareness and education, and legislative frameworks.**

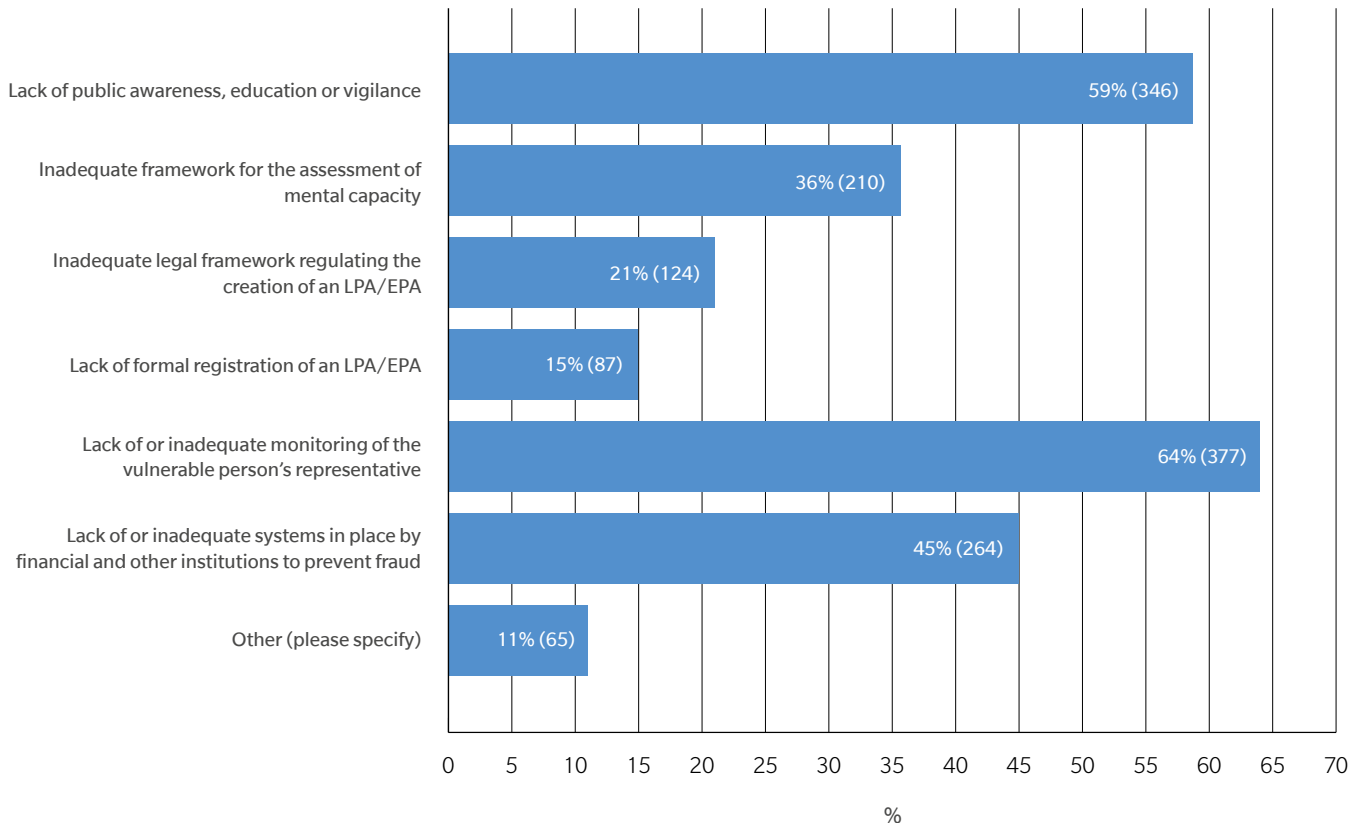
Although the concerns regarding financial abuse of vulnerable person varied in some regions or jurisdictions, the most common concerns identified were:

1. Lack of or inadequate monitoring of the vulnerable person’s representative (64%).
2. Lack of public awareness, education or vigilance (58.75%).
3. Lack of or inadequate systems in place by financial and other institutions to prevent fraud (44.8%).

Other concerns included an inadequate framework for the assessment of capacity and inadequate legal frameworks regulating the creation of LPAs/EPAs.

Respondents also spoke about a range of other issues, including costs, client unwillingness to pay for advice and digitisation.

**Q13: What, if any, are areas of concern regarding financial abuse of vulnerable persons in your jurisdiction? (Select all that apply) (n= 589)**



## 3

### FINDING 3: Capacity is a complex issue for practitioners, service providers and families.

Supporting clients who are in, or are at risk of being in, vulnerable situations is not easy. When it comes to discussing and dealing with capacity-related issues, there are many issues to consider and challenges to address. These can include applicable laws, client beliefs and attitudes, cultural considerations, family dynamics, and the practical situations and issues that may arise for any given client.

Although members in the legal professions often have a role to play in assessing capacity when putting estate planning documents into place, practitioners in all professions must consider whether their clients have the required capacity, and/or meet the professional or regulatory requirements for taking client instructions<sup>10</sup> for any given transaction or planning activity.

STEP wanted to know what the perceived barriers are to clients planning for potential incapacity and whether members are confident in advising on capacity-related matters given the complexity of the topic. Barriers to planning for loss of capacity range from assumptions, lack of subject matter awareness, fears, cultural taboos and procrastination.

When asked about perceived barriers to clients planning for loss of capacity, the reasons offered varied. Although client assumptions and lack of knowledge ranked high, many reasons related to emotional fears or concerns, and others related to denial, procrastination and practical issues. Information and data may help with some issues; however, other barriers are not as easily addressed.



<sup>10</sup> For example, the legal professions may have codes of conduct governing when they can take client instructions. In the investment sector, know-your-client rules and suitability requirements, where they apply, must also be considered.

**The top five barriers identified were:**

- 1** Assumptions that a person's family will take care of them (63%)
- 2** Lack of subject-matter awareness (56%)
- 3** Fear of having their capacity challenged (54%)
- 4** Fear of it becoming contentious with family members (49%)
- 5** It is a culturally taboo subject matter (48%)

**Additional commentary included a variety of other issues. Two of the most common themes referred to in the responses were:**

- Financial concerns about the costs involved
- Procrastination and denial

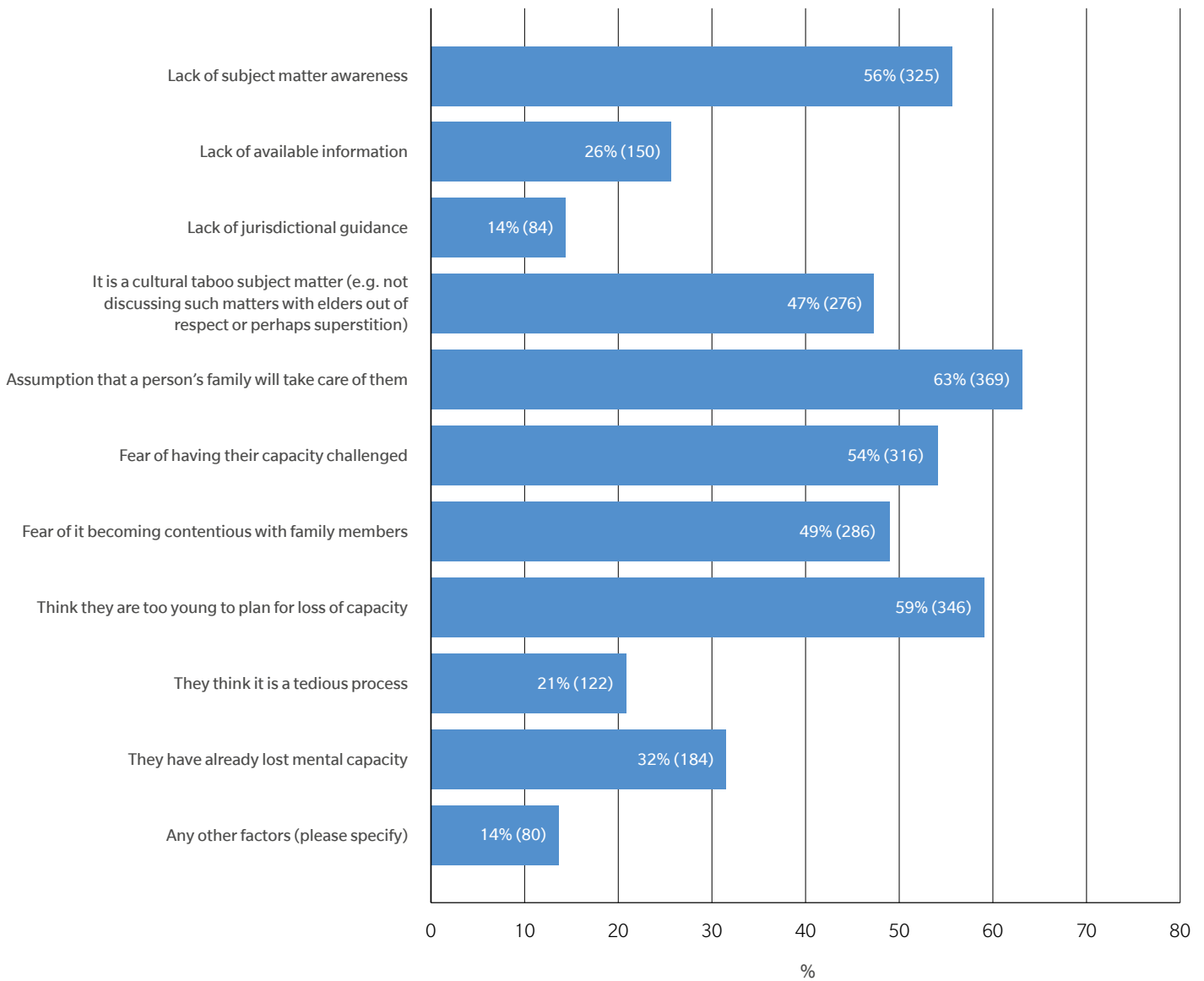
**Other themes included:**

- Lack of knowledge about the issues and need for planning
- Absence of the right people to appoint
- Timing (clients are busy or it is not a priority)
- Cultural reasons
- Inability to still plan (e.g., no longer capable)

*'A lot of fear at the idea of losing capacity and some shame at the thought of becoming a burden on family members.'*

*'Spouse/family assume they can do things that they cannot do legally once a person has lost capacity, and most professionals they turn to (in health and social care) also lack the knowledge.'*

**Q14: What do you perceive to be the main barriers around clients planning for loss of capacity?** (Select all that apply) (n=584)



*'Business owners are busy and lack time. Many entrepreneurs believe they are invincible, and most dislike the thought of giving up control. A dangerous combination as they age.'*

*'[I would benefit from] understanding about the significance of cognition in supporting decision making'.*

*'The most difficult area is addressing the lack of capacity or declining capacity with a long-standing client, as the relationship has to change. Training, with case studies, on how to address this would be helpful.'*

*'Even after 40 years in the law, I realise that I am still learning'*

### **Practitioners would welcome more information on working with clients in vulnerable situations, particularly on matters related to capacity.**

Although **19% of respondents indicated that they were extremely confident in supporting and advising clients around capacity-related issues** and **44% reported that they are confident**, 27% reported that they were somewhat confident or not very confident. Even those who have the information commented that they are always learning. This finding reveals an opportunity to support practitioners across jurisdictions and professions to be able to better assist their clients.

Respondents identified a number of capacity-related issues about which they would welcome more learning. Priorities emerging from the survey were:

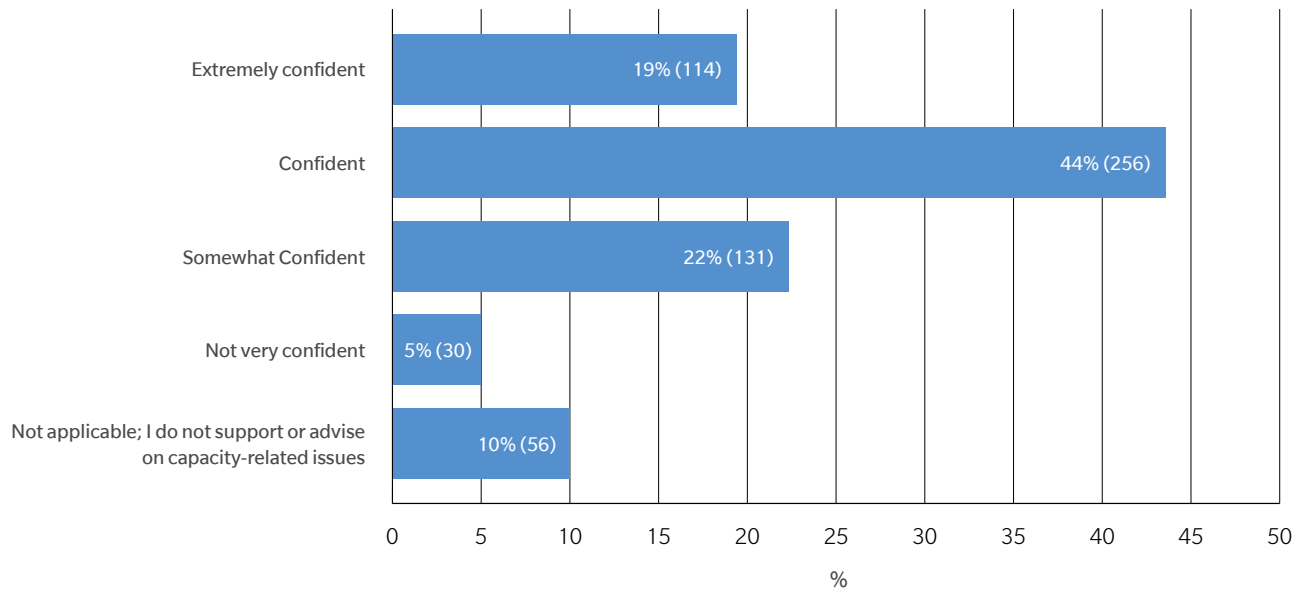
- Understanding more about the nature of incapacity itself (e.g., recognising the signs) (54%)
- Understanding the nuances around different definitions of capacity within a statute (50%)<sup>11</sup>
- Learning how to assess/apply the legal tests of mental incapacity (48%)
- Working with vulnerable clients (43%)

Other topics that members are interested in learning more about include:

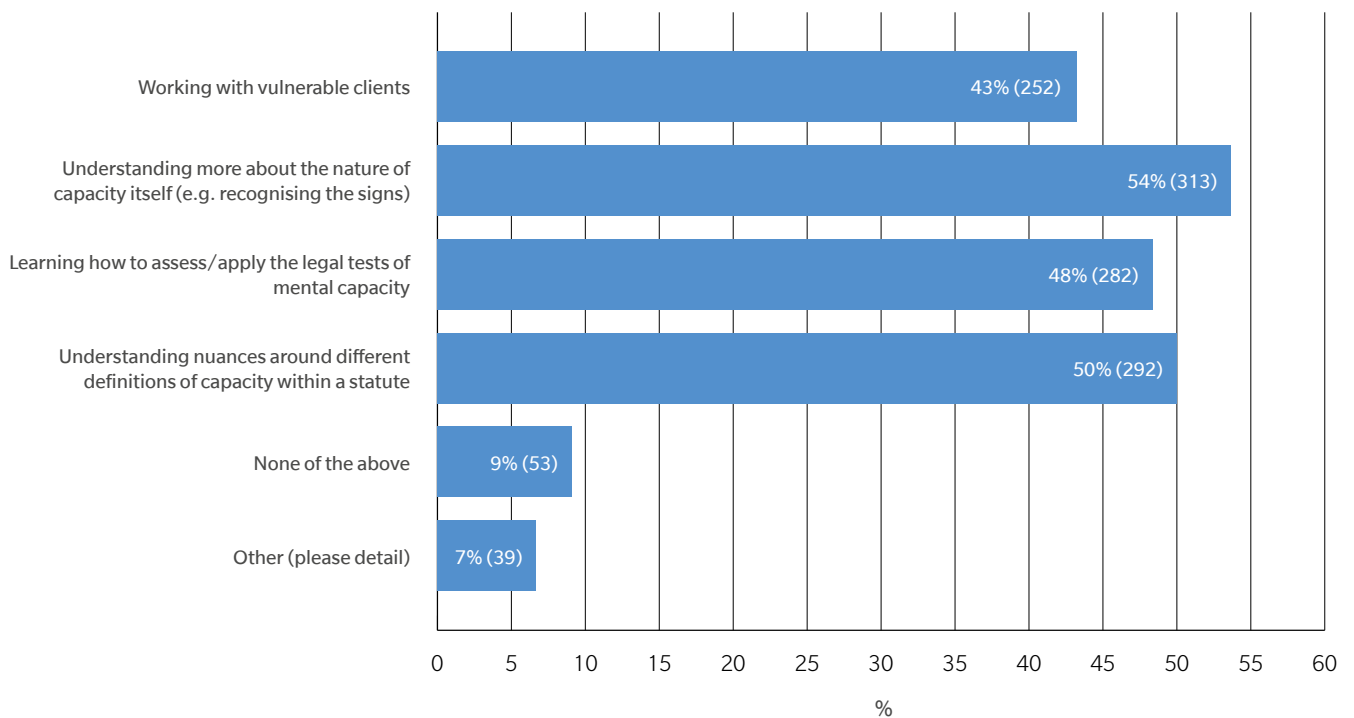
- Multi-jurisdictional capacity issues
- Identifying and assessing capacity issues
- Managing client relations
- Recognising abuse
- Knowledge of systems and processes

<sup>11</sup> In many jurisdictions, the test of capacity depends on the type of decision that the client must make.

**Q15: How confident do you feel in supporting and advising your clients around capacity-related issues?** (Select one) (n= 587)



**Q16: What areas/capacity-related issues would you benefit from greater learning on/in?** (Select all that apply) (n= 583)



4

**FINDING 4:**  
**Although the LPA/EPA is an important legal tool for planning for future incapacity, there are barriers and issues to be addressed locally through policy and legislation.**

Respondents identified many benefits of LPAs/EPAs from their clients' perspective. STEP sought to hear about the barriers and issues that are preventing clients from planning and making LPAs/EPAs where legislation exists. We also wanted to hear from those in jurisdictions that do not have LPA/EPA legislation.

A majority of respondents stated that all jurisdictions should have an LPA/EPA in some form. Those from jurisdictions that do not have LPA/EPA legislation provided reasons for why it was needed.

*'A majority of respondents stated that all jurisdictions should have an LPA/EPA in some form'*





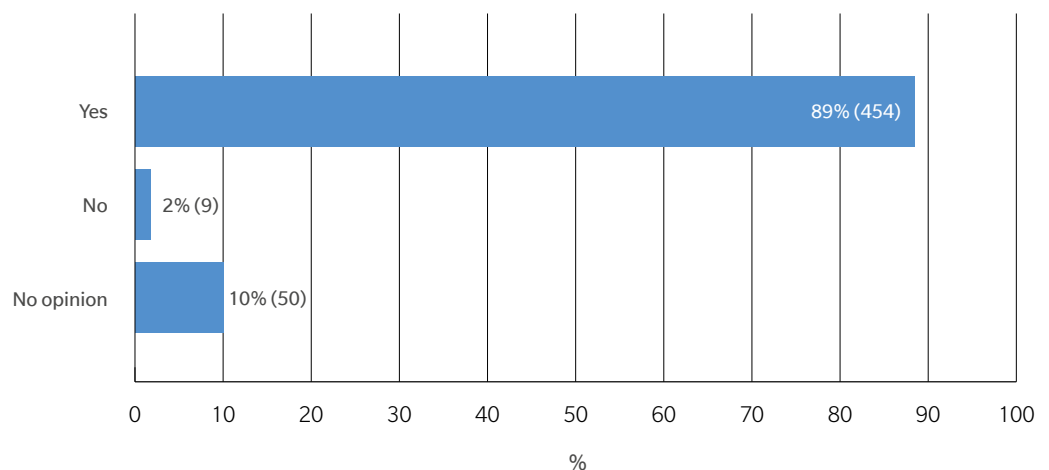
### LPA/EPA legislation is needed in all jurisdictions

Respondents identified the many advantages that clients see for having an LPA/EPA in place. They reported that an LPA/EPA ensures the person's wishes are respected (82%). Other advantages included business continuity if the person loses capacity (67%) and ensuring a person's values and beliefs are upheld when making decisions for medical treatment (66%). Half noted that an LPA/EPA also ensures that the person's dependants are financially supported, should the person lose capacity. **The commentary also included themes around practicality, reassurance, peace of mind, protection for self and being a part of a cohesive plan.**

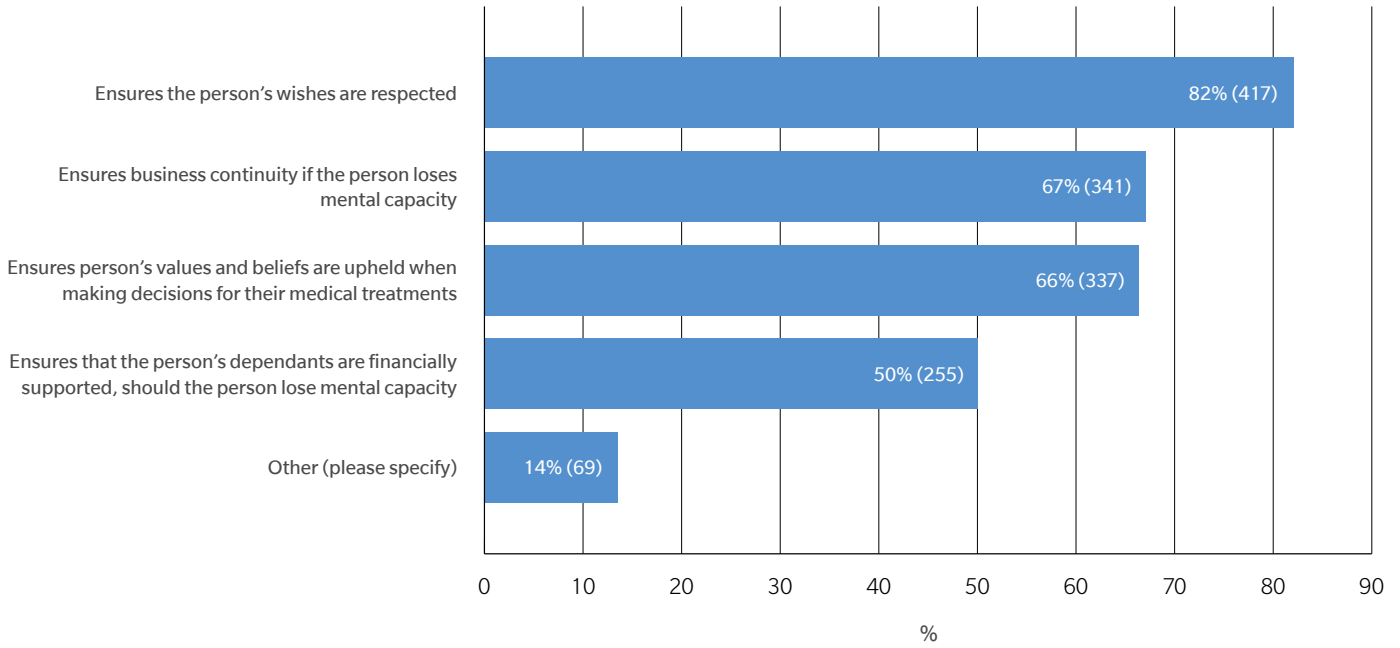
However, there are many jurisdictions around the world that do not yet have LPA/EPA legislation. Reasons for welcoming such legislation included:

- Provides a more universal approach
- Allows protection for clients and the professional
- To better serve clients
- Recognises a person's legal right to make their own decisions
- Provides clear process and structure
- Raises the profile of the topic and issues
- Cost and time issues

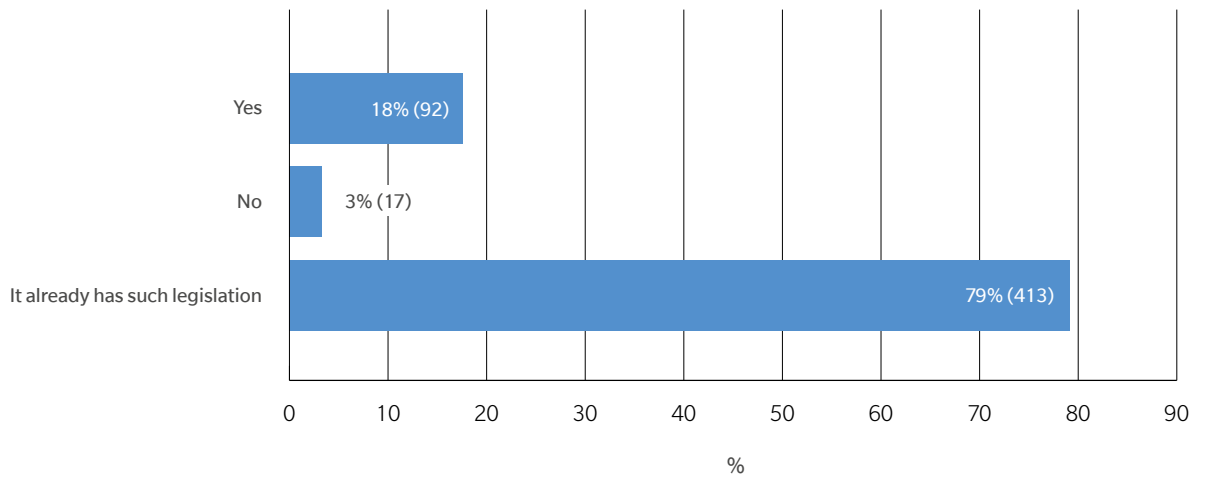
#### Q32: Should all jurisdictions have an LPA/EPA in some form? (Select one) (n=513)



**Q33: What do you perceive your clients consider as advantages for having an LPA/ EPA? (Select all that apply) (n=508)**



**Q28: If your jurisdiction does not currently have LPA/EPA legislation would you like to see adoption of LPA/EPA legislation in your jurisdiction? (Select one) (n=522)**

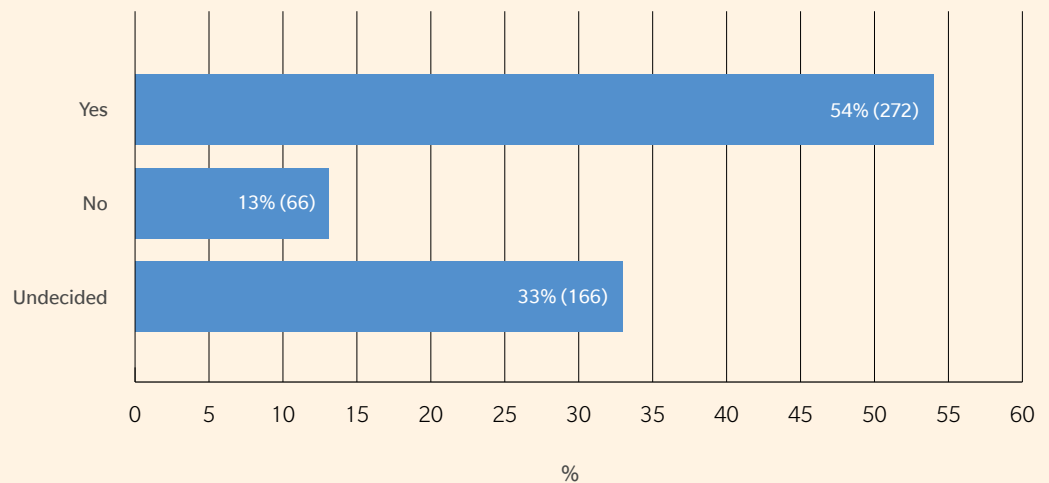


## There are opportunities to strengthen safeguards and reform the LPA/EPA system

Over half (54%) of respondents believe that the safeguarding strategy around LPAs/EPAs in their jurisdiction needs to be strengthened to mitigate abuse. Irrespective of jurisdictions' laws, the reasons offered varied and often conflicted; the most common themes included:

- More education on the nature of an LPA/EPA and role of the representative
- Checks and monitoring
- Accountability/reporting
- Clearer avenues for reporting abuse

### Q39: Do you think the safeguarding strategy around LPAs/EPAs needs to be strengthened in your jurisdiction to better mitigate abuse? (Select one) (n=504)

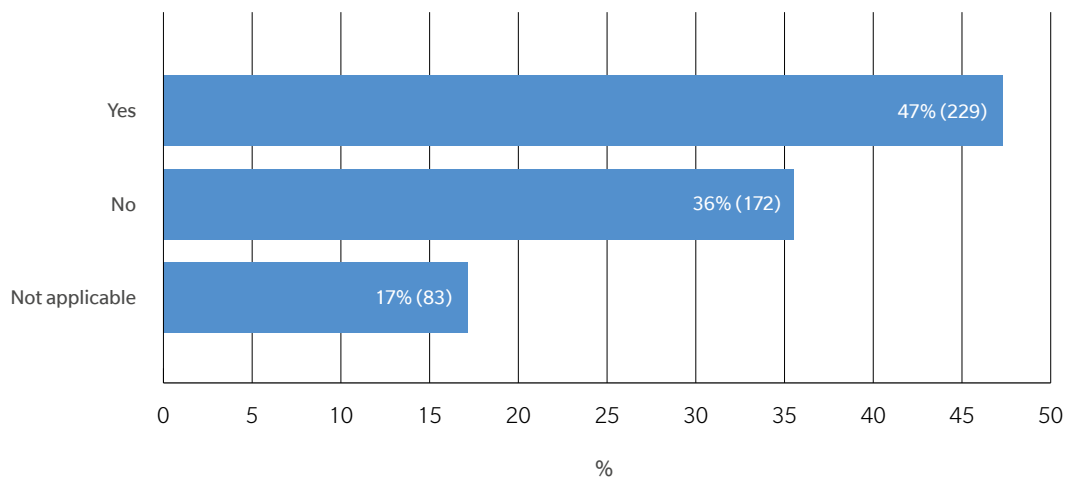


*'I don't believe that more safeguarding is needed. I feel that more awareness should be given regarding what happens when an LPA needs to be used.'*

Others **felt that their LPA/EPA system itself required reform**. Again, while recommendations varied within and across jurisdictions, and reflected conflicting opinions on regulatory requirements, many pointed to the need for regulation, monitoring and safeguarding. Others cautioned against overcomplicating and making the process too cumbersome/expensive. Other themes that arose include:

- Requiring capacity assessments before the LPA/EPA is used
- Delays in the processes, including registration
- Who should be preparing LPAs/EPAs
- Onerous document requirements and processes
- Education around the fiduciary role of a representative
- Clarity, detail or guidance on several aspects (authority/powers, activation, effect of renunciation, compensation, enforcement mechanism, capacity test, criteria to be appointed a representative in a LPA/EPA)
- Harmonisation between states/national consistency
- Standardisation/uniformity of documents

**Q41: Do you believe that the LPA/EPA system in your country/jurisdiction should be reformed?** (Select one) (n=484)



*‘We need to evolve policy and practice about mitigating the risk of abusive or coercive conduct in the management of someone’s affairs. This is as much a social compact problem as a legal or social problem.’*

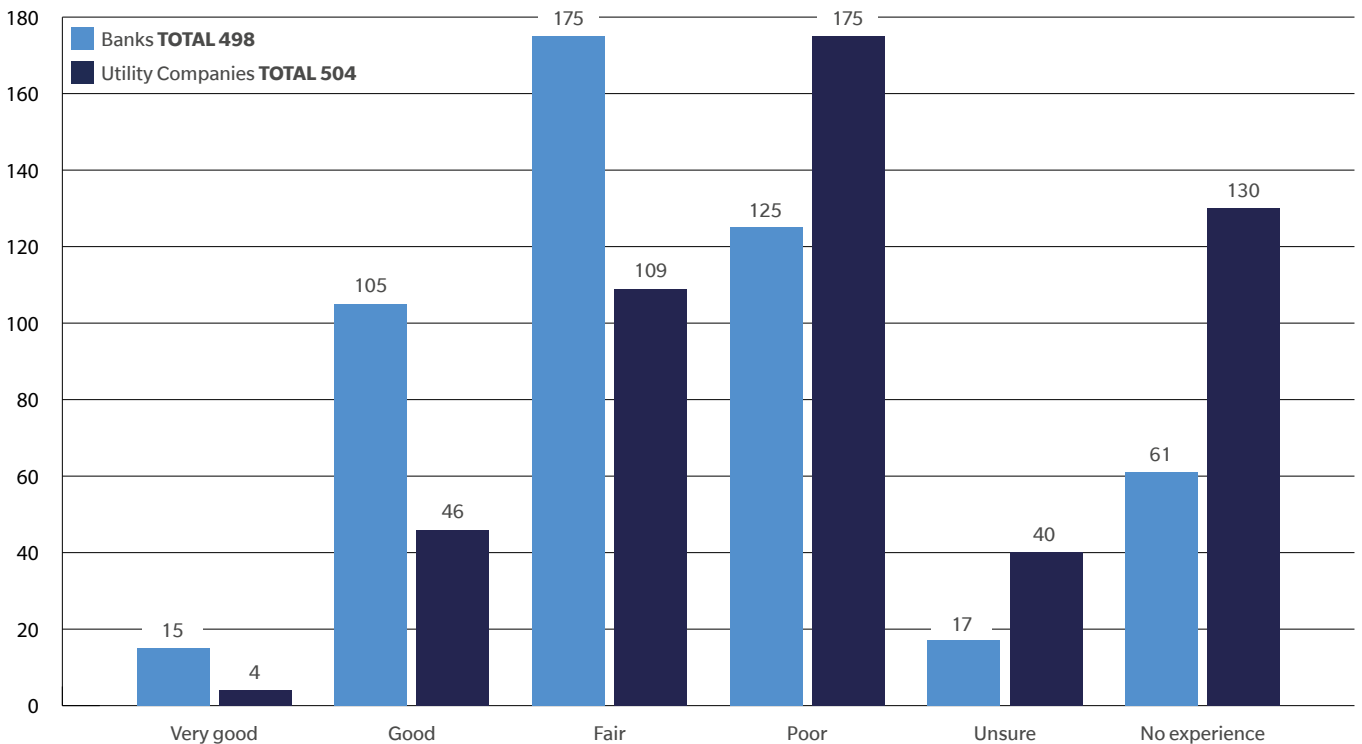
*'My jurisdiction has the rules. It just needs more public and third-party education. Financial institutions can probably enhance staff training or processes to ensure documents are respected, but not accepted blindly.'*

**There is an opportunity to work with service providers to improve the experience for clients and their representatives**

Education of clients and representatives often came up in the survey. Anecdotally, one often hears about issues with service providers, including banks and utility companies, which most clients, and later their representatives, interact with. STEP wanted to hear about respondents' experiences with these two groups of service providers. When asked to rank experiences with banks and utility companies, **experiences ranged from good to poor for banks** and **fair to poor for utility companies**.

**Q37: In your experience, what is the knowledge and comprehension level of the following service providers when faced with an LPA/EPA?**

*(Rate each service provider) (n= 506)*



## Choosing a representative can be challenging and choices can have significant consequences

Clients often appoint family or friends as their representatives. However, this is not always possible. Clients may also have reasons for not appointing family or friends. Some clients prefer to appoint professionals.

As noted in Finding 2, where there is a lack of monitoring, accountability and guidance for representatives on how to carry out their duties, **the choice of a representative can have consequences for the client and, therefore, is very important.** STEP wanted to know what influences client choices. The findings reveal that clients may benefit from having more information about their options and how to identify who is best placed to look after their interests if the need arises.

### The top five reasons for not appointing friends and family included:

- 1 Lack of trust in friends/family (69%)
- 2 Friends/family live in geographically distant locations (61%)
- 3 No living friends/family (57%)
- 4 Do not wish to inconvenience friends/family (50%)
- 5 Friends/family do not hold the same values and beliefs (41%)

Other reasons identified themes related to family conflicts, clients not understanding the purpose of the LPA/EPA and/or how it works, privacy and not wanting to share information, avoidance and preference for a professional.

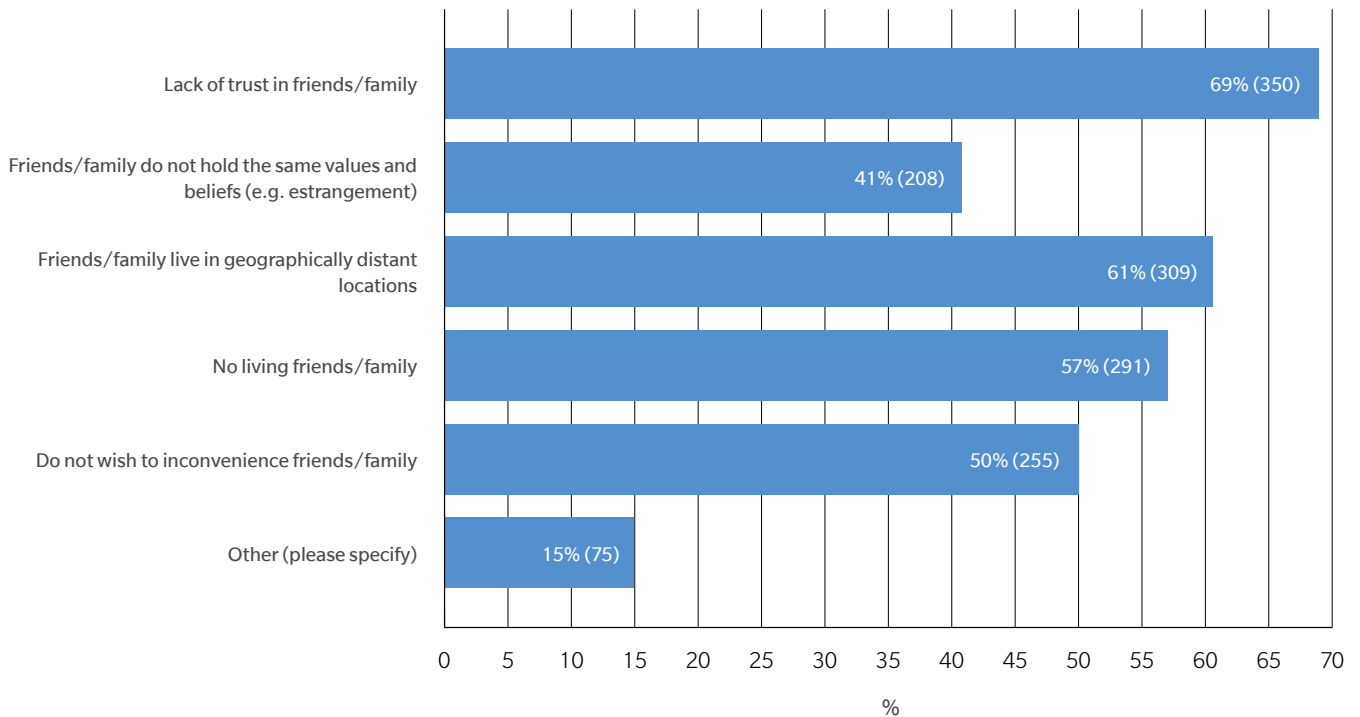
### When asked why clients appointed professionals, the top two reasons were:

- Unbiased; acting in client's best interest (37%)
- Expertise and knowledge (29%)

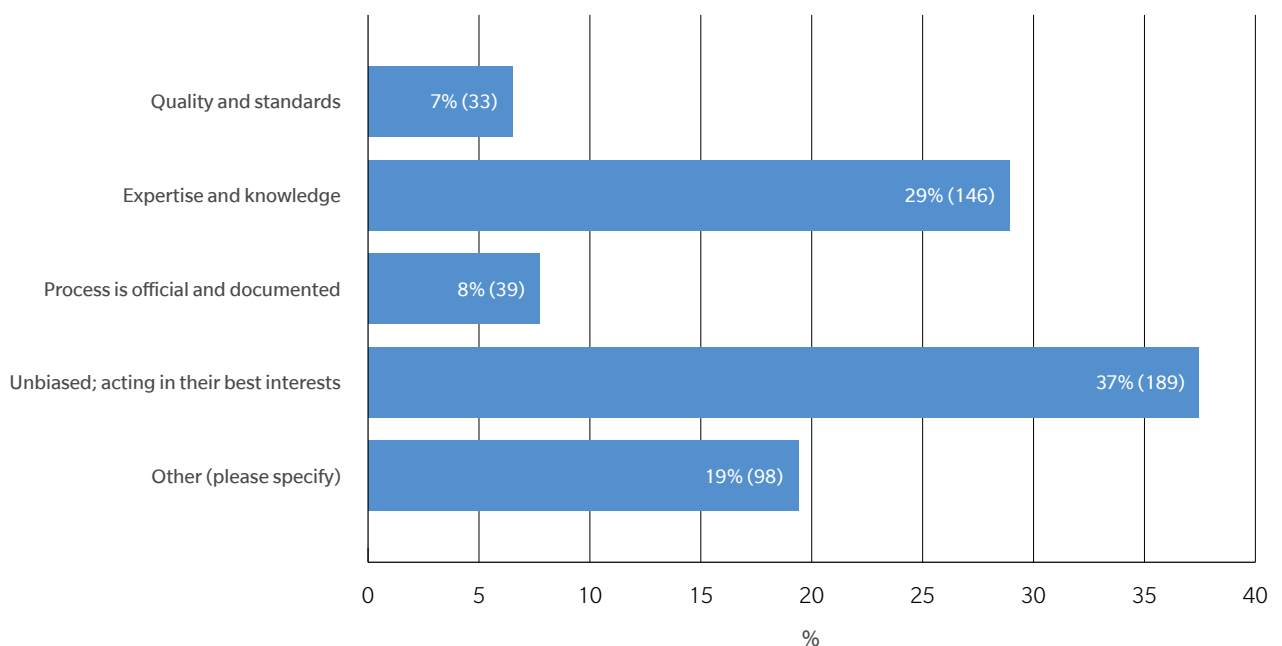
Additional commentary noted that professionals were needed in the absence of a suitable person. Other reasons related to trust issues, privacy reasons, insurance requirements and the complexity or extent of the client's affairs.



**Q30: What do you perceive to be your client’s reasons for not appointing a friend or family member as their representative under an LPA/EPA? (Select all that apply) (n=510)**



**Q31: What do you perceive to be your client’s main reason for appointing a professional under an LPA/EPA? (Select one) (n=505)**



5

**FINDING 5:**

**There is a demand for cross-border recognition and portability of LPA/EPA powers.**

85% of respondents agreed that it would be beneficial if an LPA/EPA created in one jurisdiction was recognised and accepted in other jurisdictions. 42% believe that the issue is an important one, while 26% agreed that it is relatively important.

**Cross-border recognition and portability of LPAs/EPAs is challenging.** There have been efforts internationally that seek to address some of the challenges and issues.

As STEP seeks to develop proposals to address this demand for recognition and portability, we wanted to hear from respondents about the challenges and issues that may arise. The cautions and feedback received were informative and will guide our activities going forward.

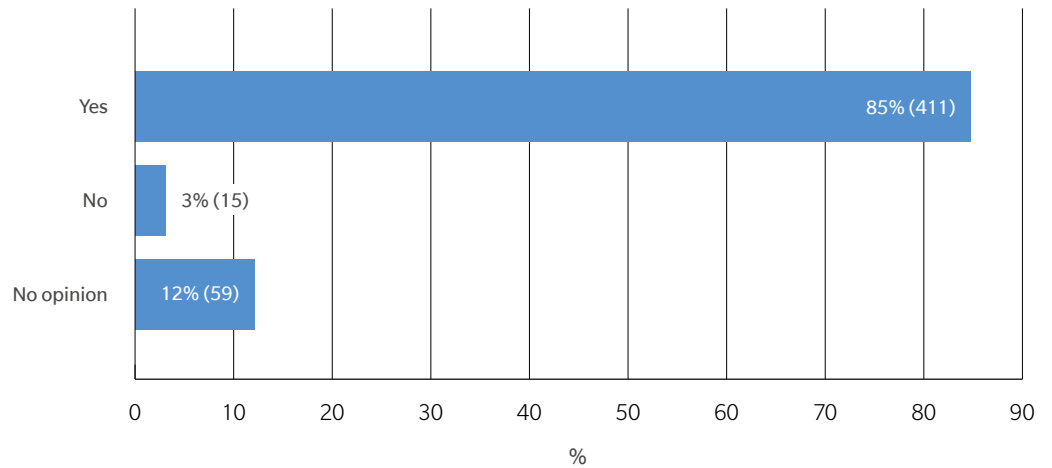
**Challenges and issues can be categorised under the following themes:**

- Language, terminology and translation issues
- Acceptance of a new format and/or document
- Different processes and formalities required for documents to be accepted
- Proof of validity
- Different standards for LPA/EPAs and requirements for when a document is effective
- Different jurisdictional rules on the scope of representative powers
- Conflict-of-law issues, especially regarding real property
- Domestic implementation of the powers
- Ensuring awareness and understanding of the rules for recognition and scope of powers
- Challenges with recognition by banks and service providers

*'The process of recognising foreign powers of attorney is difficult, lengthy and costly..... It would be advantageous to have an easier recognition process.'*



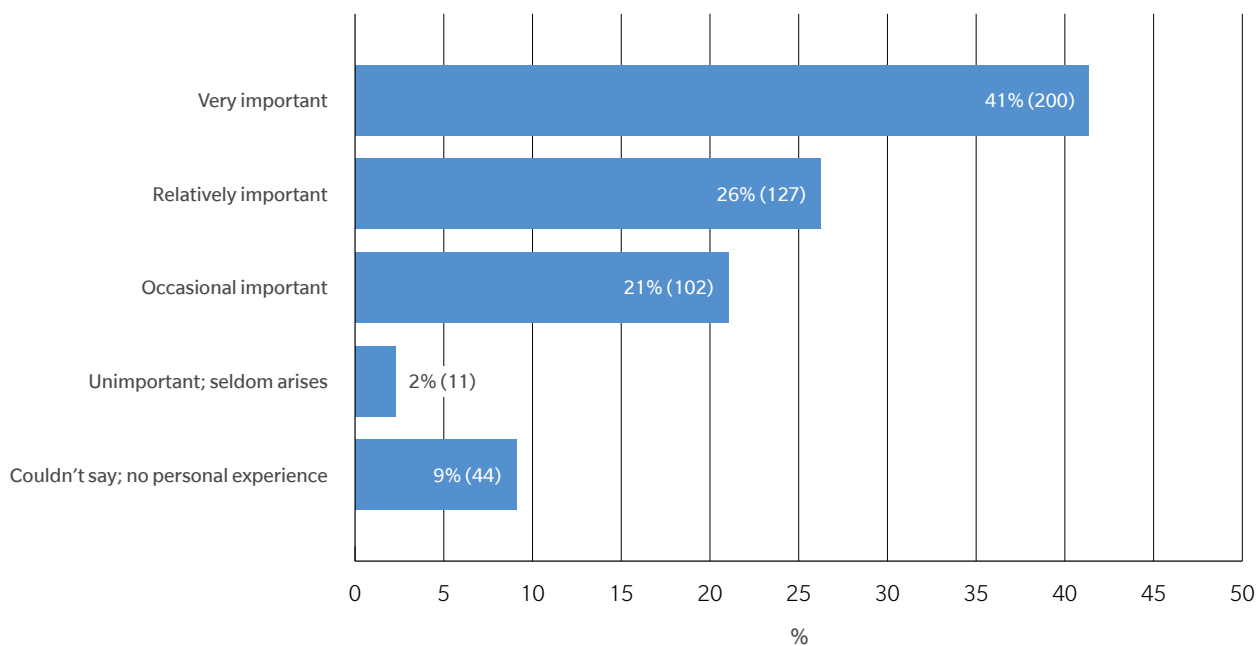
**Q43: Do you think it would be beneficial if LPAs/EPAs were recognised and accepted in other jurisdictions globally?** (Select one) (n= 485)



*'An internationally acceptable enduring power of attorney would be of great value'*

*'I think there needs to be a universal EPA recognisable across jurisdictions as people are global now and have assets in multiple countries.'*

**Q46: In your opinion, how important is this issue of cross-border recognition and portability of powers?** (Select one) (n= 484)



*'Banks are uncomfortable dealing with POA anyway...add in language or jurisdictional questions and it's a challenge'*

*'Cross-border recognition is a minefield.'*

# 04.

## THE WAY FORWARD



**The survey has identified a number of opportunities to guide the way forward in addressing the issues and challenges. These can be grouped into three main priorities:**

### 1

#### **Ensure global legislation is robust and consistent**

- Promote the need for robust legal frameworks for safeguarding incapable clients through powers of representation.
- Support jurisdictions to advocate for the introduction of legislation granting powers of representation.
- Promote the need for cross-border recognition and portability of powers of representation.

### 2

#### **Safeguard against abuse**

- Provide guidance to practitioners on matters related to identifying and responding to concerns of financial abuse.
- Raise public awareness about the options for choosing trustworthy representatives.
- Advocate for improved monitoring of representatives across jurisdictions.
- Advocate for improvements to legislation and practice around capacity assessments for financial matters so that they are carried out by recognised professionals.
- Be active in the digital transformation discourse, ensuring discussions and implementation consider both access and safeguarding of the vulnerable.

### 3 Educate about capacity and associated planning

- Raise public awareness of capacity issues and the importance of planning ahead and having open conversations with family members.
- Educate the public on the roles and duties of representatives and the rights of the client in decision-making processes.
- Support learning and knowledge about capacity issues among allied professionals.
- Support learning for practitioners on capacity related issues, including recognition, tests of capacity, and the assessment process.
- Work with financial institutions and utility companies to identify their challenges and develop solutions to improve the experiences for all parties.
- Educate governments and the public about the social and economic benefits of having a lasting/enduring power of attorney.

To achieve these will require collaboration with legal associations, governmental and non-governmental organisations, charities, financial institutions and health care professionals to formulate better and more universally accepted and applicable policy.





# ABOUT **STEP**

STEP is a global professional body, comprising lawyers, accountants, trustees and other practitioners that help families plan for their futures.

Our mission is to inspire confidence in families planning their assets across generations by setting and upholding high professional standards, informing public policy, promoting education, and connecting practitioners globally to share knowledge and best practice.

Full STEP members, known as TEPs, are internationally recognised as experts in their field, with proven qualifications and experience.

## STEP

Artillery House,  
11-19 Artillery Row,  
London, SW1P 1RT,  
United Kingdom

Telephone: +44 (0) 203 752 3700

Email: [step@step.org](mailto:step@step.org)

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